



November 7, 2018

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Re: Modification to Text of Proposed Regulation: Title 27 CCR, Clear and Reasonable Warnings, Section 25607.34 and 25607.35 Residential Rental Property Warnings

Dear Ms. Vela:

The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high-quality rental housing in California. CAA advocates on behalf of rental housing providers in legislative, regulatory, judicial, and other forums.

CAA appreciates OEHHHA's willingness to develop a safe harbor warning scheme that is appropriate and workable for the rental housing industry and believes that the proposed regulations come very close to achieving that goal. CAA's comments on the modified proposal appear below.

Section 25607.34 (b) Residential Rental Property Exposure Warnings – Methods of Transmission

Subsection (b) requires warnings to be provided to each known adult occupant at the time of renting, leasing, letting, or hiring out of the property and each year thereafter. Subparts (b)(1-4) allow the initial and annual warnings to each known adult occupant to be provided in a variety of ways. Some of the modifications to this section will be helpful to CAA in its effort to provide compliance guidance to its members. Other modifications are still problematic, as discussed below.

Required Warning Recipients - Known Adult Occupants: The first sentence in subsection (b) defines the population that must be warned regarding exposures at residential rental properties as "known adult occupants." CAA interprets this term to mean a person at least 18 years in age who is occupying the premises and whose presence is known to the person or entity that is required to provide a Proposition 65 warning. However, the term is not defined in the regulation. There is text in the proposed regulation that suggests that warnings are required for persons other than "known adult occupants." In addition, the regulation does not state to whom the adult occupant must be known or what constitutes knowledge. The presence of individuals whose status is unclear is a common occurrence at residential rental properties. A tenant may have a long-term guest, a new partner, or a caregiver, and the property management company or property owner may be aware of that person's presence but not their name or whether they are living at the property. This situation is compounded by the many local rent control and just-cause eviction ordinances that now give the

tenant the right to move in adult relatives without the approval of the owner.¹ Also in many instances, maintenance staff or an employee that resides on site may know that person is present but may not be aware that they are not tenants. Another scenario, which is particularly common at smaller properties, such as single-family homes, is that the owner of the property (who may live nearby) may know a non-tenant is living there, but the property management company that has the duty to comply with Proposition 65 does not. It is unclear what level of knowledge, or suspicion – of an employee, agent or client of the business with the duty to warn – would transform the person into a “known” occupant.

Section 25607.34, Subsection (b)(1) – Warning Letter

The modification to the warning methodology in subsection (b)(1) allows a landlord to avoid the issue of “known adult occupants” entirely by providing the annual warning by delivering a letter addressed to “Tenants and Occupants.” CAA interprets this section as allowing a landlord to satisfy the warning requirement by delivering a single letter to the unit that is addressed to all tenants (by name), all occupants named in the lease (by name) and “Tenants and Occupants” (in case there are other known adult occupants whose names are unknown.) The new provision could, however, be reasonably interpreted to instead mean either of the following.

- (1) Two letters:** one letter that is addressed to all tenants (by name) and all occupants named in the lease (by name) and a second letter addressed to “Tenants and Occupants”
- (2) Multiple letters:** separate letters addressed to each tenant or occupant whose name is known, and an additional letter addressed to “Tenants and Occupants.”

CAA requests that this provision be clarified so that it is not the inspiration for a new round of punctuation-based litigation.

Section 25607.34, Subsection (b)(1) – Warning Letter-Delivery Method

The warning letter described in (b)(1) must be “delivered to the property.” CAA interprets this to allow any reasonable method of delivery (i.e., sliding it under or posting it on the tenant’s door, first class mail to the unit, etc.) rather than a specific type of service. If the intent of this section is to require a specific method of delivery, such as first-class mail, CAA requests that the section be amended to specifically state the acceptable method(s) of delivery.

Section 25607.34, Subsection (b)(2) – Email Warning

This section suggests that a warning must be provided to someone other than “known adult occupants.” The section’s reference to “known adult occupants and to other tenants and occupants” is inconsistent with the scope of warning recipients established in (b). It is unclear who the “other occupants” are. The first sentence in section (b) defines the persons on residential rental property to whom warnings must

¹ For example: Section 17.23.1250 of the San Jose Municipal Code prohibits an owner from evicting tenants who have allowed their spouse, domestic partner, or parents to move into the unit, regardless of whether those persons have applied or been approved by the landlord. The Cities of Mountain View, Richmond, and Alameda have similar provisions in their just-cause eviction ordinances.

be provided as “each known adult occupant.” CAA’s understanding is that this is intended to encompass (1) tenants, i.e., those who have signed the lease; (2) other known adult occupants- who could be named in, but not sign the lease, such as dependent adults; and (3) other known adult occupants – for example long term guests, live-in caregivers, etc. All of these people are covered by the term “known adult occupants.” While the term “tenant” is unnecessary for that reason, it is clear who the tenants are. The additional “and occupants,” however, suggests that a warning is required to be provided to some type of “occupant” who is not a known adult occupant. The only occupants this could mean are (1) children, and (2) occupants whose existence is not known to the owner. This is problematic for two reasons. First, a warning is not required to be given to these people to meet the safe harbor as defined earlier in subsection (b). Second, it is unclear how the owner would identify them and have their email addresses. This could be resolved by using the term “known adult occupant” throughout the regulation as the person to whom a warning regarding residential rental property exposure must be provided.

It is also unclear in the email warning section whether, if the tenants of a unit have designated a single email address for communications from the landlord, the landlord may satisfy the duty to warn tenants and other known adult occupants by sending the warning to that single address.

Section 25607.34, Subsection (b)(4) – Renewal Lease, Subsequent Warnings

This section is duplicative and confusing. In the absence of this subsection, a landlord must provide the warnings at leasing and annually thereafter (subsection b) and the initial and annual warning may be provided by letter, email or in the lease (subparts (1-3)).

For example, at the inception of the tenancy, the landlord could provide the warning in the lease to the single tenant who signs the lease. No additional warning method is necessary because there are no “other occupants” in a vacant unit. A year later, at lease renewal, in addition to the original tenant, there is (1) an agreed-to long term guest, (2) a live-in caregiver for the disabled tenant and (3) the boyfriend of the caregiver who stays over occasionally. The new lease agreement may name the live-in caregiver, but probably not the long-term guest, or the boyfriend. Under (b)(1-3) the landlord would be in compliance if the warning were provided in the lease (warning the tenant and the caregiver) and by letter (warning the guest and the boyfriend). In the alternative, the warning could be provided to everyone by delivering a single letter addressed to everyone named in the lease and “Tenants and Occupants.” Similarly, if the landlord is not “renewing” the lease, but it is allowing the tenancy, by operation of law, to convert to a month-to-month tenancy due to ongoing payment of rent, the landlord must still provide the warning 12 months after the original move-in warning was provided. This could be done by delivering a letter as described above. Every 12 months thereafter, the landlord would have the same options for providing the warning.

Section (4) muddies the waters. CAA recommends that this section simply be stricken from the regulation.

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Section 25607.34 (c) – Residential Rental Property Exposure Warnings – Methods of Transmission

Subsection (c) provides that “If the lease, rental agreement, renewal, or amendment for the property or any other disclosures or required notices from the landlord to the tenant are provided to the occupants in any language other than English, the warning must be provided in that or those languages.”

The inclusion of any “required notices” that “are provided ... in any language other than English” as a trigger for translation results in an overbroad and unworkable translation requirement. CAA requests that this provision be revised to require a warning to be provided in a language other than English only when other documents are required to be provided in a language other than English by state law. At this time, the only state laws that require landlords to provide information or documents in languages other than English are Civil Code 1632 (translation of contracts)² and Health and Safety Code 13220 (emergency procedure information).³ In general, these laws require the contract or information to be provided by the drafting party in Tagalog, Chinese, Spanish, or Vietnamese if the lease was negotiated in that language. CAA provides its rental/lease agreement and all lease addenda in Spanish to help its members who communicate in Spanish to comply with this requirement. CAA has not received any requests for lease documents in any other languages. CAA also makes available a tri-fold Emergency Procedure brochure developed with the State Fire Marshall to conveniently provide the emergency procedure information in four additional languages if the lease was negotiated in a language other than English.

The approach of these state laws is consistent with the approach OEHHA has taken for environmental exposures in the final Clear and Reasonable Warnings regulation (Title 27 CCR Section 25605). That regulation requires the safe harbor environmental warnings to be provided in “English and in any other language ordinarily used by the person to communicate with the public.” It is reasonable to require a landlord to provide warnings in the language ordinarily used to communicate with tenants and applicants, for example when the lease is negotiated. However, requiring the landlord to provide Proposition 65 warnings in any language that happens to appear in a document that the landlord is required to distribute, is not.

Many cities in California have standard city-prepared notices that must be distributed by landlords or posted on the property that explain tenant rights under local ordinances. In the past year, CAA has also

² Civil Code Section 1632 (b) provides that “Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, that includes a translation of every term and condition in that contract or agreement:

.... (3) A lease, sublease, rental contract or agreement, or other term of tenancy contract or agreement, for a period of longer than one month, covering a dwelling, an apartment, or mobilehome, or other dwelling unit normally occupied as a residence.”

³ Health and Safety Code Section 13220 (b)(3): “If the owner or operator, or any individual acting on behalf of the owner or operator, of an apartment house, as described in this subdivision, negotiates a lease, sublease, rental contract, or other term of tenancy contract or agreement in any language other than English, the information required to be provided pursuant to paragraph (2) shall be provided in English, in international symbols, and in the four most common non-English languages spoken in California, as determined by the State Fire Marshal.”

tracked nearly a dozen local rent control ballot initiatives that would have required such notices in various languages. The languages in these city notices are not co-extensive with those covered by state law. Some require only Spanish, or Spanish and Vietnamese. Some require additional or different languages. For example, a notice required by the City and County of San Francisco must include Russian and Filipino⁴ translations. In addition, these ordinances often empower the local rent board to add additional languages, as necessary based on the languages spoken in the community.⁵ As more communities develop their own landlord/tenant ordinances and California becomes more diverse, the variety of languages included a city-provided tenant's rights documents is likely to increase. These local ordinances simply require a landlord whose property is subject to the ordinance to provide a standard notice available on the city's website to all tenants. The landlord is not required to answer questions or otherwise communicate in the languages in the city's notice.

These local government-prepared notices should not trigger a requirement to translate the Proposition 65 warning. Unlike the local rent boards, OEHHA's website does not provide a standard mandatory residential rental property warning notices in multiple languages (including translations of the chemical names), that can be printed on demand and attached to a lease. While CAA can certainly obtain and provide for its members translations of warnings regarding the most common sources of exposure and chemicals, (i.e., those provided as examples in the Initial Statement of Reasons) keeping up with the multiplicity of ever-changing local requirements and creating forms tailored to each situation is not feasible.

Having a safe harbor that changes over time and is different from one city to the next makes compliance next to impossible and greatly increases the likelihood of litigation for CAA's members. Such a harbor is treacherous, rather than safe. Making the translation requirement consistent with other state requirements applicable to housing providers, and with the new regulations for environmental exposures, would provide residents with the information in a language they can understand, but without adding multiple pages of foreign language text to most rental agreements in California. The translation requirement should not be triggered by notices prepared by other entities for distribution by landlords. Instead, it should apply when an owner is required by state law to provide a translation of lease documents or when a foreign language is "ordinarily used by the person to communicate with the public." "Ordinarily" in this context would have its usual meaning⁶, and not sweep in the occasional document that includes text in a foreign language. CAA has two proposed approaches to revising this subsection.

⁴ See <http://sfrb.org/new-eviction-notice-requirements-november-9-2015>. This link refers to Tagalog, while the referenced document at the link below, indicates that it is in Filipino. These two languages, while similar, are not the same – and in a technical translation, the distinctions may be significant.
<http://sfrb.org/sites/default/files/Document/Form/1007%20Notice%20to%20Tenant%20Req%27d%20by%2037.%209%28c%29-Eng-Sp-Ch-Viet-Rus-Tag.pdf>

⁵ CAA can provide OEHHA with additional information about these local ordinances upon request. One example is the City of Concord. See section 19.40.030 of the Concord Municipal Code requiring the mandatory "Notice of Availability of Rent Review" to be available in English, Spanish, and any other languages determined necessary by the City Manager.

⁶ I.e., "usually, normally, as a (general) rule, generally, in general, for the most part, mainly, mostly, most of the time, typically, habitually, commonly, routinely."

CAA proposes the following language to address the issues raised above:

Proposed Replacement Section 25607.34(c)

Alternative #1

"If the lease, rental agreement, renewal, or amendment thereof for the property or any other disclosures or required notices from the landlord to the tenant is required by State law to be provided to the occupants in any language other than English, the warning must be provided in that or those languages, in addition to English."

Alternative #2

"If a language other than English is ordinarily used by the person to communicate with applicants and tenants, for example to negotiate the rental agreement, the warning must be provided in that language in addition to English."

Section 25607.34(d) – Other Warnings Required

This section provides that in addition to the warnings discussed above, which may be provided in the lease or by letter, residential rental properties must also provide the warnings for "enclosed parking facilities" and "designated smoking areas" under Sections 25607.20, 21, 28 and 29. Those sections require the warnings to be provided using signs. Application of those signage requirements to all residential rental property leads to some absurd results:

Example #1: A property has been converted to non-smoking. A single long-term tenant in Unit 104 has been "grandfathered" in and is allowed to smoke only in his apartment. As required by state law, (Civil Code Section 1947.5) the property discloses to all other tenants that the entire property, except Unit 104 is designed non-smoking. The proposed regulatory text would require the designated smoking area text to be posted at the entrance to, and inside Unit 104. Similarly, if smoking is allowed in a single-family home, the smoking sign would have to be posted at the entrances and inside, possibly throughout, the home.

Example #2: A property management company manages 50 single-family homes. Each home has an attached garage that serves only the residents of the home. The proposed regulation would require the posting of a sign at the vehicle entrance to the garage, at the entrance from the home into the garage and at any other garage entrance-such as a door from the back yard. Similarly, many townhome-style apartment or condominium complexes provide a separate enclosed garage for each unit. Under this proposal a warning would be required at the entrance to each garage, all down the row.

Providing a safe harbor that allows designated smoking area and enclosed parking garage warnings to be provided by the means listed in this proposed regulation – in certain limited situations would avoid these results. For example, this provision could allow the warnings to be provided using the methods in Section 25607.34 if the enclosed parking facility or designated smoking area serves only a single household. The warning text regarding these areas could be included in the lease, or in a letter or email.

Comments on Initial Statement of Reasons Section 25607.35 Residential Rental Property Exposure Warnings – Content

The examples of warning text for exposures to listed chemicals at rental properties will help CAA to provide compliance guidance and materials for its members. They can be included in rental agreements and warning letters, and CAA can provide translations for this text. Additional examples, if appropriate, would also be helpful. Some of CAA's members with portfolios that consist mostly of newer properties are concerned about having a suitable example of a warning for each endpoint – i.e., a warning about a carcinogen and a warning about a reproductive toxin. While the Initial Statement of Reasons provides a good sampling of example warnings for carcinogens, it only provides a few options for warnings for reproductive toxins and those examples would only be applicable in certain types of properties. CAA requests that OEHHA add any sample warnings for any additional exposures sources/endpoints that are appropriate.

Thank you for your consideration of our comments and suggestions. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

California Apartment Association



By
Heidi Palutke
Vice President Compliance and Education